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Diversity is Dead. Long Live Diversity: The Racial Isolation Prong of Kennedy's PICS Concurrence in *Fisher* and Beyond.

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Diversity is Dead. Long Live Diversity: The Racial Isolation Prong of Kennedy’s PICS Concurrence in Fisher and Beyond.

Francisco M. Negrón, Jr.*

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I. INTRODUCTION

America in 2016 is more diverse than ever before. Racial and ethnic minorities are more visible than ever in the media, in politics and in our communities with birth and immigration trends contributing to a new reality where no single racial and ethnic group can claim majority numbers.¹ But, these trends alone can provide a myopic view of the

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¹ “Trends in immigration and birth rates indicate that soon there will be no majority racial or ethnic group in the United States—no one group that makes up more than fifty percent of the total population. Already almost one in ten U.S. counties has a population that is more than fifty percent minority. Eight counties reached that status in 2006, bringing the total to 303 of the nation’s 3,141 counties.” Ron Crouch, *The United States of Education: The Changing Demographics of the United States and Their Schools*, CENTER FOR PUBLIC EDUCATION (Nov. 15, 2007), <http://www.centerforpubliceducation.org/You-May-Also-Be-Interested-In-landing-page-level/Organizing-a-School-YMABI/The-United-States-of-education-The-changing-demographics-of-the-United-States-and-their-schools.html> (updated May 2012 by Joyti Jiandani).

complete picture of racial and ethnic integration in America, particularly in our public schools. Even as society as a whole continues to increase in overall diversity, many communities are becoming more racially isolated.² As a result, the schools that serve those communities are, too.³

This situation places additional burdens on many school districts committed to the educational benefits of diversity. They continue to seek ways to diversify their student populations, but, after the landmark 2007 decision in *Parents Involved*, they find that their options are more limited. The conventional wisdom after *Parents Involved* counsels that the explicit use of race in K-12 public schools was dead,⁴ nullifying the single most effective tool—consideration of race—to promote diversity in student assignment plans. In light of this apparent restriction, much of the conversation at the K-12 level then turned to how public schools could engage in race-conscious, as opposed to race-specific, programs either to maintain or to achieve diversity in student assignments. What is often missed in that conversation is that the re-emergence of racially isolated communities and schools may be the saving grace for the explicit use of race or ethnicity commonly thought to have been extinguished by *Parents Involved*. This essay explores the often ignored “racial isolation” prong of Justice Kennedy’s concurrence in *Parents Involved*, and argues that it may be a path to the explicit use of race⁵ as a

² “But even as the decrease in the white share of the public school populations has led to a greater exposure of white students to minority students, it has also led to a diminished exposure of black and Hispanic students to white students.” For example, in 2005-2006 “[r]oughly three-in-ten Hispanic (29%) and black (31%) students attended . . . nearly all-minority” schools defined as “one in which fewer than 5% of the students are white. Richard Fry, *The Changing Racial and Ethnic Composition of U.S. Public Schools*, PEW HISPANIC CENTER (Aug. 30, 2007).

³ “Though most school districts have achieved unitary status . . . many continue to monitor the isolation that is now driven by parents’ preferences in where to live and correspondingly, where to send their children to school.” Dylan Conger, *New Directions in Measuring Racial Isolation in School* (N.Y.U. Inst. for Educ. and Soc. Policy, Working Paper No. 08-02, 2008).

⁴ “. . . *Parents Involved* forecloses districts that have been declared unitary or those that recognize the benefits of diversity in their schools from engaging in racially-based student assignments. For de facto systems, the controlling *Parents Involved* opinion interpreted the Equal Protection Clause as prohibiting the use of overt racial classifications in voluntary desegregation programs.” The Hon. George B. Daniels & Rachel Pereira, *May It Please the Court: Federal Courts and School Desegregation Post-Parents Involved*, 17 U. PA. J. CONST. L. 625, 636 (2015). And, “At heart, Justice Kennedy . . . disapproves[s] of . . . individual typing by race. Individual typing includes, for instance, the ‘assignment of individual students by race,’ with race being the dispositive factor or the only factor.” *Grating Race-Conscious Student Assignment Plans in the Cauldron of Parents Involved v. Seattle School District*, Joseph O. Oluwole & Preston C. Green III, 56 WAYNE L. REV. 1655, 1670 (2010).

⁵ “Race” as used in this article means both race and ethnicity.

school's compelling interest in avoiding the harms of racial isolation. It also explores the impact the upcoming Supreme Court decision in *Fisher II* may have on that path for diversity in K-12 schools.

II. THE CONVENTIONAL WISDOM AND BEYOND.

Justice Kennedy's concurrence is notable for its recognition that diversity is a legitimate and "compelling educational goal a school district may pursue."⁶ But, because Kennedy's concurrence also rejected the ability of a school "to classify every student on the basis of race and to assign each of them to schools based on that classification," means he noted were "crude measures" reducing "children to racial chits,"⁷ the conventional wisdom after *Parents Involved* is that explicit or individual use of race is not permitted as a mechanism to diversity or integrate schools.⁸ This part of the concurrence was echoed in the majority opinion which found that to pass constitutional muster, diversity plans needed to provide "for a meaningful individualized review of applicants" rather than relying on "racial classifications in a 'nonindividualized, mechanical way.'"⁹

Contributing to the conventional wisdom was the majority's conclusion that the school districts in *Parents Involved* used "amorphous end[s]" (meaning policies' resulting impact on diversity were minimal)¹⁰ to implement their diversity plans, and failed to consider race-neutral alternatives as required by *Grutter*.¹¹

⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring).

⁷ *Id.* at 798.

⁸ "The [Supreme] Court [in *Parents Involved*] held that preserving the district's unitary status by means of racially-based student assignments, albeit "benign" racial motives, was nevertheless constitutionally impermissible." *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 349 (5th Cir. 2011). And, "Justice Kennedy, in his concurrence, endorses diversity as a compelling educational goal . . . He joins in the judgment, however, because the school district plans for diversity in *Seattle* were directed at individual students, not at neighborhoods as is the case here." *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 559 (3d Cir. 2011) (Roth, J., concurring) (citing *Parents Involved*, 551 U.S. 782-83).

⁹ *Parents Involved*, 551 U.S. at 723.

¹⁰ *Id.* at 704, 735.

¹¹ "The districts have also failed to show that they considered methods other than explicit **racial** classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives, and yet in *Seattle* several alternative assignment plans—many of which would not have used express **racial** classifications—were rejected with little or no consideration." *Parents Involved*, 551 U.S. at 735. (emphasis added) (citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

But, while it is true that Justice Kennedy objects to the individual use of race to grant an individual student enrollment in a particular school, he also recognizes an express interest in addressing the harms of racial isolation.¹² This recognition opens the door to the explicit use of race,¹³ because Kennedy's concurrence permits its use expressly when it is necessary.¹⁴

A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification.¹⁵

It may be argued, then, that schools may use race in student assignment policies designed to remedy conditions of racial isolation when there is some legitimate educational need. Some observers have couched that need in terms of the Court's previous decision in *Grutter*, but Justice Kennedy himself provided no express definition of what that "necessity" may be, other than by defining it by what it is not: the policies used by both Seattle and Jefferson County in *Parents Involved*.¹⁶

¹² "To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of **racial isolation** in schools, it is, in my view, profoundly mistaken." *Parents Involved*, 551 U.S. at 788 (emphasis added).

¹³ "Five of the Justices [in *Parents Involved*] endorsed the compelling interests in reducing racial isolation and in promoting educational diversity in elementary and secondary schools, and the opinions of those Justices provide guidance on how school districts might proceed in designing constitutionally permissible policies." Angelo N. Ancheta, *A Constitutional Analysis of Parents Involved in community Schools v. Seattle School District No.1 and Voluntary School Integration Policies*, 10 RUTGERS RACE & L. REV. 297, 298 (2008).

¹⁴ "Justice Kennedy provides two different paths for public school authorities that want to consciously pursue school integration. He gives them wide discretion to pursue it without employing individual racial classifications of students. If these measures are inadequate, however, then Justice Kennedy also allows for the limited use of individual racial classifications to advance the compelling state interest of diversity—as in *Grutter v. Bollinger*—or of preventing racial isolation." Kevin Brown, *Reflections on Justice Kennedy's Opinion in Parents Involved: Why Fifty Years of Experience shows Kennedy is Right*, 59 S.C. L. REV. 735, 743 (Summer 2008).

¹⁵ *Parents Involved*, 551 U.S. at 797-98.

¹⁶ *Id.*

Moreover, given the parsed nature of the votes in *Parents Involved*, including Justice Kennedy's refusal to sign on to that part of the plurality opinion that eschews racial isolation as a compelling interest,¹⁷ it is arguable that the express use of race to remedy racial isolation is constitutional as long as the means used meet narrow tailoring requirements.¹⁸ In fact, Kennedy's rejection of the plurality's view that racial isolation is not a compelling interest lends support to the notion that districts may employ individual racial determinations in student assignment in remedying racial isolation in schools.¹⁹

III. RACIAL ISOLATION, SEGREGATED COMMUNITIES AND IMPACT ON K-12 EDUCATION.

Despite the end of *de jure* segregation and years of court-ordered integration, many communities across the country today are becoming

¹⁷ Justice Kennedy did not sign on to Part III. B. of *Parents Involved*, in which the plurality opined, "The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling in 'racial diversity.' While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance." *Id.* at 732.

¹⁸ "Because of Justice Kennedy's basic disagreement with Chief Justice Roberts' analysis of the school districts' compelling interest arguments [reference omitted], there is no holding from the court addressing whether the school districts' interests in promoting racial diversity and in avoiding racial isolation are compelling. Nor is there a holding by the Court that these interests are not compelling. Instead, the court's invalidation of the Seattle and Louisville plans turns on the narrow tailoring prong of strict scrutiny." Ancheta, *supra* note 13, at 303-04. And, "Recognizing Justice Kennedy's opinion as controlling, *Parents Involved* stands for three major principles. First, schools that individually classify students by race and then assign them to a school on this basis are subject to strict scrutiny, which requires them to establish a compelling interest to justify the plan and prove that the means they chose to achieve this objective are narrowly tailored. Second, eliminating the harmful effects of racial isolation and achieving the benefits of diversity are compelling interests. Third, student assignment plans that do not classify or assign individual students by race, but rather only consider race in a general way when redrawing school district boundaries, building new schools, or targeting recruits, are unlikely to even trigger strict scrutiny." Derek W. Black, *Voluntary Desegregation, Resegregation, and the Hope for Equal Educational Opportunity*, HUM. RTS. MAG., Fall 2011, at 2, 3.

¹⁹ "Justice Kennedy, who provided the fifth vote in the five-to-four *Parents Involved* decision, specifically disagreed with the 'all-too-unyielding insistence that race cannot be a factor in instances when . . . it may be taken into account.'" As a result, "[I]t is clear that the Court in *Parents Involved* did not broadly condemn all student assignment plans that facially account for race . . ." *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 367-68 (5th Cir. 2011) (King, J., concurring in part and dissenting in part).

more segregated.²⁰ Because schools reflect the communities they serve, schools are also increasingly more racially isolated, even as the overall diversity across the country grows as a whole. A number of factors contribute to the increasing isolation, including “residential housing patterns,” demographics shifts, “concentration of poverty,” and the legacy of past discriminatory practices.²¹ Ironically, as more school districts reach unitary status, they find that the very tool—race—that allowed the implementation of policies to achieve diversity in the student assignments is seemingly unavailable after *Parents Involved*.

A concern for schools as they focus on the need for increased student achievement²² for all students in racially isolated environments, is the sobering realization that racial isolation often coincides with economic isolation and marginalization.²³ Increased concentrations of poverty both in urban and rural areas contribute to learning challenges; more than seventy-five percent of predominantly minority schools are classified as high poverty.²⁴ In fact, as racial isolation grows, so do levels of poverty

²⁰ De facto “racial isolation and resegregation are increasing nationwide,” as a result of a myriad of “factors, such as residential housing patterns and private-sector discrimination.” Ancheta, *supra* note 13, at 302.

²¹ “School districts today remain racially segregated partly due to vestiges of past discrimination and an expanded resegregation of our public schools. While the resegregation today remains mostly de facto, it still presents great dangers to race relations in our country if, from their impressionable years, students are not exposed to the benefits of diversity as part of an overall educational experience.” Oluwole & Green III, *supra* note 4, at 1656.

²² “Racial isolation in public schools is particularly pernicious because it is associated with a host of other forms of isolation that impede learning opportunities for students . . . the very same harms that were admonished by the *Brown* court.” The Hon. Daniels & Pereira, *supra* note 4, at 661.

²³ “This ‘poverty segregation’ in public schools tends to go hand-in-hand with racial segregation. Many African American students attend highly racially segregated schools, and when they do, they are more likely to end up in high-poverty schools, too . . . When African American students attend a segregated school where the majority of students are kids of color, over half are attending high-poverty schools (53 percent), compared with 42 percent of all black students. As racial segregation in schools increases, so does the concentration of poverty. About 65 percent of black students in a school with a population that is three-quarters or more students of color are attending a high-poverty school.” Reed Jordan, *Millions of Black Students Attend Public Schools that are Highly Segregated by Race and by Income*, URBAN WIRE (Oct. 30, 2014), <http://www.urban.org/urban-wire/millions-black-students-attend-public-schools-are-highly-segregated-race-and-income>.

²⁴ Yet, the problems of racially isolated minority schools stem do not from race per se, but from the fact that predominantly minority schools also tend to be predominantly poor. In fact, more than 75 percent of predominantly minority schools are also high-poverty schools. Black, *supra* note 18, at 2, 4.

in schools.²⁵ Regrettably, students in these schools are suffering the ill effects of racial and economic isolation, and continue to achieve at lower rates than their counterparts in non-racially isolated schools.²⁶

Social science research strongly supports the link between racial isolation and academic under-achievement, particularly in those schools with large minority populations. In fact, “[m]ost research on the educational impacts of segregation indicates that the harm comes from the condition of isolation and its associated inequalities, not from the processes that produced the segregation.”²⁷

Conversely, research shows that the opposite is true. When schools racially diversify, the effect on student achievement, particularly for previously isolated racial minorities is beneficial. “In one of the most comprehensive studies of more than 22,000 schools and 18 million students in 45 States, researchers” examining test scores mandated under federal law reported greater increases in math scores for minority students in diverse schools than in racially isolated ones.²⁸ Because, “[t]he benefits of an inclusive education are not solely limited to academic underachievers, students of color, or low-income students,”²⁹ racial isolation arguably harms not only traditionally marginalized students, but all students, including those of majority race, by denying

²⁵ “A larger share of students in minority schools were low-income than those in multiracial schools. In fact, as the level of racial isolation increases, so too does the level of low-income students in the school. This data demonstrates that students in racially isolated schools are also far more likely to attend schools with higher percentages of low-income students, which results in schools that are not only segregating students by race but also by class.” Jennifer B. Ayscue, Alyssa Greenberg, John Kucsera & Genevieve Siegel-Hawley, *Losing Ground: School & Segregation in Massachusetts*, THE CIVIL RIGHTS PROJECT at 40 (May 2013).

²⁶ “In several major academic categories, predominantly poor and minority schools cause educational harm or underperform in comparison to other schools.” Black, *supra* note 18, at 2, 4.

²⁷ Gary Orfield, Genevieve Siegel-Hawley & John Kucsera, *Divided We Fail: Segregation and Inequality in the Southland’s Schools*, THE CIVIL RIGHTS PROJECT at 24 (Mar. 18, 2011).

²⁸ “Longstanding research on academic achievement shows that African American students who attend desegregated schools demonstrate a modest increase in achievement levels. One of the definitive reviews of the early literature concludes that desegregation has been positively linked to increases in black student achievement levels, generating gains on average of .57 of a grade year at the kindergarten level, and on average of .3 of a grade year in student performance at the elementary/secondary school level. Desegregation appears to have a greater impact on reading achievement in comparison to math, although improvements vary by context, appearing somewhat stronger for younger students and those under voluntary desegregation plans.” Marguerite L. Spencer & Rebecca Reno, *The Benefits of Racial and Economic Integration in Our Education System: Why This Matters For Our Democracy* at 13, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY (Feb. 2009).

²⁹ *Id.* at 16.

them the salutary effects that flow from diversity. For instance, researchers report that integration in some instances has led to higher scores and greater enrollment in advanced coursework for white students. In sum, “[t]hese outcomes show that, when pursuing integration, in-school strategies are effective, not only in creating collaborative environments, but also in increasing academic achievement for all students.”³⁰ The conclusion can be drawn from these results that educational interest of schools in eliminating or reducing racial isolation is more than theoretical or a desire to engage in social engineering. It is directly related to the mission of schools and their interest in promoting achievement for all students. In the context of racial isolation, integration can be an educational imperative; an educational necessity. Given what we know about the grave educational harms associated with racial isolation, in contrast to the academic benefits of racially diverse learning environments, the current demographic shifts toward entrenched re-segregation and the attendant ills intensify the need to find solutions that counteract these trends quickly and effectively in a way that race-neutral alternatives like magnet schools, attendance zones and socio-economic status alone cannot. The urgency of averting the inevitable educational harm to all in racially isolated schools arguably meets the “showing of necessity” required by the Kennedy concurrence in *Parents Involved*³¹ and thus, justifies the explicit use of race in student assignment plans without first exhausting race neutral alternatives.

IV. RACIAL ISOLATION & *FISHER*

Racially isolated schools have implications for admissions to colleges and universities.³² In *Fisher II*, a case currently before the

³⁰ Moreover, in a New York high school that was part of a research study on integration on its outcomes, a high school “increase[d] the percentage of white students passing the Regents exam from 54% to 98%. A comparative analysis of Railside High School and two other schools (Railside was considerably more ‘urban’, with a higher student population of color and greater percentage of English language learners) revealed Railside enrolling 41% of their seniors in Calculus, as compared to only 27% in the other two schools. Finally, studies focused on [another school,] the Rockville Center middle school, found that after detracking their mathematics courses, the initial high achieving students not only took more advanced courses than their tracked cohorts, they also scored significantly higher in advanced placement calculus.” *Id.* at 16.

³¹ Whether Justice Kennedy would also require an exhaustion of race-neutral or other measures is arguable. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring).

³² “The pursuit of diversity in higher education does not operate in a vacuum; the diversity efforts of colleges and universities affect school districts, and *vice versa*.” Brief

United States Supreme Court, the petitioner seeks review of a Fifth Circuit decision finding the University of Texas' (UT) plan's use of race in admissions to be narrowly tailored under strict scrutiny analysis. That plan operates to increase minority admissions in addition to any diversity achieved by a state law known as the "Top Ten Percent Plan" (TTP) which grants automatic admission to state universities to students graduating in the top ten percent of a Texas public high school. Because the TTP has achieved a measure of diversity since it was first introduced following *Grutter*, part of the High Court's consideration now will likely be a determination of necessity as identified by Justice Kennedy in *Parents Involved*. In other words, if Justice Kennedy employs a similar inquiry to that which he identified in his concurrence, the university will have to show in part what alternatives it considered to its holistic diversity plan and why the Top Ten Percent Plan is not sufficient to achieve the university's compelling interest in diversity.

But, ironically, the TTP relies on racial isolation of K-12 public schools to work albeit in a limited way.³³ The University of Texas is able to enroll more minorities under the TTP because those students are at the top of their class at racially isolated schools. Those numbers would be diluted if the same students attended a more diverse school where they were not in the top ten percent, and, therefore, would not automatically be admitted to the UT. In this manner, the TTP works in a way that discourages racially isolated schools from diversifying because their top students would be less likely to receive the benefits of the automatic admission under the TTP.

Significantly, the TTP alone has not produced a critical mass of minority students necessary to meet UT's diversity goals. For this reason, UT has employed a holistic approach which seeks to diversify its student body in ways beyond those afforded by the TTP alone. Were the High Court to invalidate UT's holistic diversity program as not narrowly tailored, the net effect would be to reduce the number of racial minority students while promoting a state framework that perpetuates racial isolation in secondary education despite its established harms. As discussed above, the benefits of diversity inure to all students, "including improved academic achievement, the inculcation of democratic and civic

for Nat'l Sch. Bds. Ass'n, et al. as Amici Curiae Supporting Respondents at 4-5, *Fisher v. Univ. of Texas*, No. 14-981 (U.S. 2015).

³³ "[A] mechanical numbers-based process standing alone [like the TTP] . . . trade[s] diversity in one setting for diversity in the other. Such plans yield numerical racial diversity in college only so long as secondary schools lack such diversity." Brief for Nat'l Sch. Bds. Ass'n, et al. as Amici Curiae, *supra* note 32, at 14.

values, and critical thinking, collaboration, and communication skills.”³⁴ Importantly, UT’s holistic review works within the reality of the TPP while also encouraging diversity at secondary schools by encouraging high academic achievement in secondary schools and making post-secondary education appealing, possible, and attractive to prospective minorities, even in diverse secondary schools.³⁵ The High Court should factor in the reality of this dynamic in its determination regarding the “need” for UT’s holistic review plan.

That schools and universities should be able to implement meaningful diversity plans which include the use of race with ultimate societal benefit is reflected by the input from the country’s business community. Today’s business community demands employees conversant in navigating diversity particularly given today’s increasingly global marketplace. “[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.”³⁶ This is because business recognizes that students “educated in a diverse setting make valuable contributions to the workforce in several important ways.”³⁷ This need for a workforce with “exposure to widely diverse people, cultures, ideas and viewpoints” illustrates how critical it is to avoid the harms of racial isolation—harms that reach beyond the classroom into our social and economic wellbeing on a national and global scale.³⁸

³⁴ Arthur L. Coleman et al., *Achieving Educational Excellence for All: A Guide to Diversity-Related Policy Strategies for School Districts*, NATIONAL SCHOOL BOARDS ASSOCIATION 6 (2011).

³⁵ “Those college opportunities, in turn, reinforce efforts to secure high student achievement at the secondary level. When students can see a clear pathway to college for students with similar backgrounds, interests, or experiences, they are more likely to strive in secondary school with an eye towards college success.³⁵ This effect is mutually reinforcing for diversity at the post-secondary level, as a clear pathway to college encourages more students to apply and increases the diversity of the collegiate applicant pool.” Brief for Nat’l Sch. Bds. Ass’n, et al. as Amici Curiae, supra note 32, at 16.

³⁶ Brief of Fortune-100 and Other Leading Am. Bus. as Amici Curiae in Support of Respondents, *Fisher v. Univ. of Texas*, No. 14-981 (U.S. 2016), citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing Brief for 3M et al. as Amici Curiae).

³⁷ According to these leading global, American enterprises, a diverse educational setting produces works with an “increased ability to facilitate unique and creative approaches to problem-solving by integrating different perspectives and moving beyond linear, conventional thinking;” are “better equipped to understand a wider variety of consumer needs, including needs specific to particular groups,” work more “productively with business partners, employees, and clients in the United States and around the world,” and “generate . . . more positive work environment[s] by decreasing incidents of discrimination and stereotyping. *Id.* at 6 (citing Brief for 3M et al. as Amici Curiae at 7 (*Grutter*); e.g., Brief for General Motors Corp. as Amicus Curiae at 2 (*Grutter*)).

³⁸ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007)(citing *Grutter*, 539 U.S. 337 (2003)).

Importantly, “[t]he market’s interest in diversity is more than merely symbolic. And, it is not geared towards the conferring of special benefits to minorities or other traditionally underrepresented groups (though that may in fact be a salutary effect of its position). Rather, the business community’s position is one that is premised on the real needs of business in the 21st Century. “American corporations must address the needs of an increasingly diverse U.S. population and a growing global market, and they need a workforce trained in a diverse environment in order to succeed in these arenas.”³⁹ This understanding is important to the Court’s consideration of why schools choose to implement diversity programs to use race. Meaningful diversity programs, like the one implemented by UT, use race not as a means to discriminate, or even to confer “a special benefit to minorities,” but rather to create the benefits that flow from a diverse student body to all students. And, significantly, that diversity, would not arise organically even with programs such as TPP.

V. CONCLUSION.

That diverse schools are “an important mechanism in maintaining a plural, democratic society” is without question.⁴⁰ And, that schools, both secondary and beyond, have a compelling interest in promoting that diversity is also without question.⁴¹ It should be also without question that the Constitution does not restrict the means schools may use to achieve that diversity only to those mechanisms or policies that appear to be race neutral. This is particularly so, when those policies are viewed in the context of our educational system as a whole, and the salutary effects diversity confers on all students. Such policies are the very antithesis of invidious discrimination. At a time when many of our public schools are becoming more racially segregated even as society at large diversifies at

³⁹ *Id.* at 7.

⁴⁰ “Another major theory about the benefits of desegregation deals with its impact on life chances, which operate through contact with networks of social and economic opportunity and skill in understanding and navigating interracial institutions. Robert Crain, Jomills Braddock, James McPartland, and others developed this line of research, which was later articulated in the “perpetuation effect” work of Crain and Wells. Perpetuation theory posits that early experiences in desegregated schools will produce students who successfully seek out diverse settings—to include colleges, workplaces and neighborhoods—later in life. In other words, school integration can have intergenerational effects, as parents who experienced diverse schools commit to diverse neighborhoods and schools for their own children.” Gary Orfield, Genevieve Siegel-Hawley & John Kucsera, *Sorting Out Deepening Confusion on Segregation Trends*, THE CIVIL RIGHTS PROJECT at 10 (Mar. 2014).

⁴¹ *Parents Involved*, 551 U.S. at 797.

increasing rates, it may be time for schools to revisit the limited use of race pronounced by many as the new normal, and embrace a bold application of Justice Kennedy's racial isolation prong. That means eschewing the conventional wisdom after *Parents Involved*, and understanding that the urgency in the academic achievement of all students forms a constitutional basis for the use of race in student assignment.